

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Date Issued: August 21, 2001

BALCA Case No. 2000-INA-230
[ETA No. P1998-NY-02394177]

In the Matter of:

USHER FARBER,
Employer,

on behalf of

KRZYSZTOF KRASINSKI,
Alien

Certifying Officer: Dolores DeHaan, New York, NY

Appearances: Andrew J. Olshevski
Brooklyn, NY
For Employer

Before: Burke, Vittone and Chapman
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This matter arises from Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification for the position of Domestic Cook. Permanent alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20. We base our decision on the record upon which the CO denied certification and Employer's request for review and any written arguments. 20 C.F.R. 656.27(c).

STATEMENT OF THE CASE

On July 28, 1997, Employer, Usher Farber, filed an Application for Alien Employment Certification seeking to fill the position of "Domestic Cook (Live-out)." (AF 6-10). The duties were listed as follows:

Prepare & cook family-style, Polish cuisine, foods & meals. Serve meals. Assist the owner of the residence in menu preparation & purchasing foodstuffs. Check foodstuffs for quality & quantity. Cook foodstuffs in quantities according to the number of guest [sic] and as suitable for occasion. Plan and follow sequence and time of cooking operations with meal serving hours & daily menu. Prepare galantines, preserves. Bake cakes & pastry. Set & decorate table. Wash kitchen utensils & dishes.

(AF 10). Employer required two years of experience in the job offered. *Id.*

On July 9, 1999, the CO issued a Notice of Findings ("NOF"), noting that "the requirement that applicants have experience in a particular type of ethnic/religious food is employer's personal preference and not a normal job requirement." (AF 18). The CO, therefore, advised Employer to either delete the restrictive requirement calling for the applicant to have two years of specialized experience in the preparation of Polish food or submit evidence to show that a business necessity warranted the requirement pursuant to § 656.21(b)(2). (AF 17-18). The CO also questioned whether the position presented a bona fide job opportunity under § 656.20(c)(8). (AF 18-20).

Employer filed his Rebuttal to the NOF on August 11, 1999 (AF 30-37). The Rebuttal primarily consisted of answers to the twelve questions presented in the NOF regarding the existence of a bona job opportunity and did not explicitly address the business necessity issue. *Id.* Employer did maintain, however, that his ethnic background sanctioned him to hire a cook who specializes in Polish cuisine. (AF 33). Although Employer claimed that he entertains frequently at home, he was unable to submit an entertainment schedule because he could no longer remember pertinent details such as the actual dates of the events or the number of guests invited. (AF 32).

On January 11, 2000, the CO issued her Final Determination ("FD"), denying the application on the ground that Employer failed to submit requested evidence to support the business necessity of the ethnic cooking requirement. (AF 38-39).

On February 9, 2000, Employer filed a Request for Administrative Judicial Review of Denial of Labor Certification. (AF 42-50). Neither a statement of position nor a legal brief has been received since the case was docketed before this Board.

DISCUSSION

In *Martin Kaplan*, 2000-INA-23 (July 2, 2001) (*en banc*), the Board held that "cooking specialization requirements for experience in specific styles or types of cuisine are unduly restrictive within the meaning of the regulation at section 656.21(b)(2), and therefore must be justified by business necessity." *Kaplan*, 2000-INA-23, slip op. at 3. To establish business necessity under section 656.21(b)(2)(i), an employer must demonstrate that the job requirements

bear a reasonable relationship to the occupation in the context of the employer's business and are essential to perform, in a reasonable manner, the job duties as described by the employer. *Information Industries, Inc.*, 1988-INA-82 (Feb. 9, 1989) (*en banc*). In the context of domestic cook specialization requirements, the first prong of the business necessity test may often focus on how the cooking specialization is related to the family's need for a cook. The second prong of the test may often focus on whether the length of experience stated by the employer as a job requirement is required to be able to cook the specialized cuisine. *Kaplan, supra*, slip op. at 10.

In the NOF, the CO informed Employer that he may rebut her finding that the requirement for a cook with two years' experience preparing Polish cuisine was unduly restrictive by providing evidence that:

- 1) An applicant with two years of cooking experience could not readily adapt to a Polish style of cooking;
- 2) An applicant with no prior experience in Polish cooking is incapable of preparing Polish food; and
- 3) Neither Employer nor anyone else in her family is able to provide training or instruction in the Polish cooking tradition.

(AF 17-18).

Employer, however, failed to provide any such evidence to establish that the job requirements are essential to the performance of the job duties. In the Rebuttal, Employer maintained that "Polish style cuisine is – like any other national or religion-based cuisine – very specific in recipes and ingredients. It relies on very detailed knowledge of ingredients and traditional recipes." (AF 30). Normally, an employer's unsupported assertions are not sufficient to carry its burden of proof, but are evidence that must be considered and given the weight it rationally deserves. *Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*). However, here, Employer's assertion carries little weight since it is not accompanied by supporting reasoning or concrete evidence. Therefore, Employer's statement fails to prove that an otherwise experienced domestic cook is unable to learn Polish cooking within a reasonable period of taking the job.

Employer also stated in the Rebuttal that "it is highly unreasonable to assume that there will be anyone willing to provide training while at the same time paying the salary exceeding \$36,000. [Since] the prospective employer and his spouse are not qualified to provide training, there is no possibility for them to provide an inexperienced applicant with adequate training." (AF 30). Incapacity to provide training, however, does not furnish evidence relating to the length of time it takes to gain competency in Polish cooking. Nor does it suggest that someone without experience cooking Polish food cannot learn how to prepare the cuisine via another method, such as through the consultation of cookbooks. Thus, in light of the foregoing, the two year specialization requirement remains unduly restrictive since Employer has not sufficiently linked

the requirement to successful execution of the job.

ORDER

Since we find that Employer has not documented that two years of experience in the cooking specialization is supported by a business necessity, we **AFFIRM** the CO's Final Determination denying alien labor certification.

SO ORDERED.

Entered at the direction of the Board by:

Todd R. Smyth
Secretary to the Board of Alien Labor
Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.